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No. 567

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

UNITED STATES OF AMERICA

v.

RICHARD W. DOUGLAS

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DALE D. DRAIN,
1405 G. Street, N. W.,
Washington, D. C.,
Attorney for Respondent.

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REASONS FOR DENIAL

The assertion that this is a test case is not justified by the record. A number of tracts, all situated on the Wahluke Slope and bearing the same relation to the Columbia Basin Irrigation Project, were comprised in this proceeding. There were several dozen different defendants. After the act of taking the matter was allowed to drift until Mr. Douglas, owner of one of the larger tracts, brought his particular case on for trial. There was nothing novel involved except that the land condemned was subject to the provisions of

the Columbia Basin Irrigation Act, and was covered by a "recordable contract." It should not have been a matter of surprise that the trial court adopted a measure of damage which would be compensatory to the landowner, nor is there anything new or startling in the test which the court prescribed for the jury to use in assessing damages. If the first case out of a group which is to be tried by a condemning authority turns out to be a disappointment to the condemner, and must therefore be labeled a test case, the category of test cases would become very great indeed.

There was nothing extraordinary about this matter, such as to place it beyond the competence of the trial court and the reviewing court. The question involved has a decidedly local application. That it should be of national importance is quite unthinkable. The Court of Appeals in passing on the matter has not rendered a decision in conflict with any other authority, high or low; and it has certainly not departed from the usual course of judicial proceedings. How the general law of compensatory damages should be applied to Columbia Basin lands was the bone of contention, and it seems most unlikely that any precedent set here could have any far-reaching consequences outside of the particular frame of reference.

Without going into the merits, it may be thought permissible to outline the problem sufficiently to assist the Court in getting a general view. The question had these elements:

1. In a certain local area, the United States enters into contracts of like tenor with several hundred individuals, for irrigation of their lands.

2. Consideration on the part of the landowners is

   A. That each will pay his respective share of construction costs,

   B. That he will pay the water rates,

   C. And that he will not sell the subject land, for a specified term, at any price less than a value to be fixed by an earlier appraisement.

3. Appraisement is then had of the land in its raw state.

4. Time passes, and the reclamation work approaches completion.

5. A condemnation proceeding is started by another department of the government, and the original appraisal value is paid into court.

On this set of facts the lower courts held that the landowner was not limited to the appraised value. Inasmuch as condemnation proceedings had abrogated the contract, it was not binding upon either side; not binding on the government, and not binding on the landowner. The government was no longer obligated to deliver water, and the landowner was in like manner released from any limitation imposed by the contract disabling him in respect of the price for which he could sell.

Even though the land was as yet unimproved physically, it was manifest to both the trial court and the appellate court that the land would certainly be worth more when the period of waiting had nearly expired and the water was approaching, than it would have been worth at the inception of the project. In the very last month of the waiting period, let us say, no owner in his senses would have been willing to sell his tract for such a price as it would have commanded a dozen years earlier. There was therefore no general market for Columbia Basin lands, for the reason that willing sellers no longer existed; they were constrained by the terms of their "recordable contracts" to defer sales until such time as they might actually realize the fair value of the land. There being no general market in the ordinary sense of the term, the court had recourse to the rather familiar hypothesis of an imaginary sale, in which the seller might be regarded as free to sell (in theory) to an imaginary buyer, who would step into the shoes of the landowner so permitted to make a hypothetical sale.

The petitioner is unwilling to recognize any measure of damage other than the original raw-land appraisement set years ago. Refusing to admit the propriety of any other approach to the problem, petitioner now uses the term "retention value" as a sort of label for the compensation awarded, seeking by innuendo to bring this award under the condemnation of the decision in *U. S. v. Commodities Corporation*, 339 U. S. 121, 94 L. Ed. 713. The Court of Appeals carefully

discriminated the present case from the authority cited, showing that in the latter a speculator resisted an award for black pepper seized by the government at a price which was the ceiling price in wartime, the gist of his contention being that the commodity in question was subject to wide fluctuations and that within a few years he might obtain a much greater price if allowed to retain it—hence the thought of "retention value." But in the present case the award given by the judgment has no element whatever of speculation, nor the computation of price or profits to arise in the future. The landowner presented no theory as to what the land would be worth in the future; he asked for damages to be computed only on the basis of what the land was actually worth at the time of the taking. Hence there is in this case no element of "retention value" in the somewhat odious and speculative sense attaching to that expression in the Commodities Corporation case.

The merits of the case are not before the Court at this moment, but it may not be out of place to suggest that there is a just and true sense in which the thought of retention by the landowner ought to have been considered, and was considered. He had the right to use the land, even though he could not sell it for a number of years to come at more than the appraised value. Possibility of future sale was only one of Mr. Douglas' rights. He had a right to occupy it. His right to actual use of the land must be regarded in fixing compensation, as well as any restricted right

of sale. The record shows that the reclamation water would have been delivered to the tract during the current year of 1954 (R. 275). When the beneficial effect of the coming of the water upon the land is about to be enjoyed, would this or any other court undertake to say that the value of the land is still no greater than the figure applied to it a dozen years earlier when it was mere sagebrush land, without any particular prospects? And should this Court now feel alarm because a higher measure of compensation was awarded?

That the condemnation cost the condemner more than it expected to pay, and that on a similar set of facts applying to other landowners named as defendants in the same proceeding the total to be paid might exceed the original appraisement value—all this is believed to be a highly unworthy reason to press for certiorari. The Constitution requires just compensation, and that such compensation might be more than the condemner would like to pay is no ground for a writ. It might be thought that the District Court and the Court of Appeals could be trusted to see that justice was done; the circumstance that justice requires the payment of more money than was anticipated can hardly be regarded as a license to complain to the Supreme Court. Indeed, it is no compliment to the Supreme Court of the United States to assume that it will be influenced by the mere fact that a million dollars, more or less, will be at stake. And even if this were a proper argument, the respondent protests

that there is no foundation whatever in the record justifying any such computation as is offered in the petition.

Perhaps the principal bid for the attention of this Court, in aid of the petition, is the suggestion that Mr. Douglas had no contract rights at any time but such as might be set aside by action of the government, under the terms of the Columbia Basin Act or the contracts made pursuant thereto. This statement we challenge unreservedly. A close examination of the Columbia Basin Irrigation Act, and of the master contract made with the Irrigation District, and of the recordable contract itself, reveals the fact that when once the land has been accepted and qualified for irrigation, and a recordable contract signed, there could be no arbitrary dismissal of the landowner, nor arbitrary refusal of the contract duty to water his land. True enough, the owner might be deprived of his rights for a legal cause, as for instance if he should make a sale in violation of his contract, or fail to comply otherwise with the terms of his contract; also if it should transpire that some few acres out of his holding could not be reached by the water, these would be automatically excluded and performance excused as to such non-irrigable land. But apart from these easily recognized limitations, the government could not by mere arbitrary action reject an owner who had once signed a recordable contract.

Even if the Secretary of the Interior were able to exclude lands arbitrarily and thereby disappoint the

landowners as the petition argues, it is nevertheless an undeniable fact in this case that no such exclusion had ever taken place as to the Douglas land. The cited part of the contract (R. 63) contemplates possible exclusion of lands for cause, by authority of the Secretary of the Interior. No such exclusion having occurred, and the contract of Mr. Douglas being still in good standing and of full force at the time of taking, the argument of the petitioner fails when it is said that Mr. Douglas' expectation of future benefits was merely defeasible, and that he cannot complain because his expectation is now frustrated. Our point is that even if petitioner were right in saying that the Secretary of the Interior might arbitrarily frustrate Mr. Douglas' expectations, it does not follow that any and every other agency of government could likewise interfere. Granting for the moment petitioner's argument that the Secretary of the Interior might so act by virtue of the contract, it remains that he did not so act; he was content to leave the contract in good standing. The frustration that has occurred to Mr. Douglas did not come about through any reservations in the contract, nor any action taken under the contract; respondent's disappointment was caused by action of another agency, using the power of eminent domain.

CONCLUSION

Believing that the reasons herein stated put this case outside the scope of review by certiorari, as determined by the rules and the practice of this Court, we urge that the writ be denied.

DALE D. DRAIN,
1405 G. Street, N. W.,
Washington, D. C.,
Attorney for Respondent.